UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ST. NICHOLAS HOME, INC.	)	
Employer	)	
and	)	Case No. 29-RC-11807
LOCAL 338, RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, UNITED FOOD AND COMMERCIAL WORKERS	)	
Petitioner	)	

REPORT ON OBJECTIONS AND NOTICE OF HEARING

Upon a petition filed on September 28, 2009,[1] by Local 338, Retail, Wholesale, and Department Store Union, United Food and Commercial Workers, herein called the Petitioner or the Union, and pursuant to a Stipulated Election Agreement signed by the Petitioner and St. Nicholas Home, Inc., herein called the Employer, and approved by the Regional Director on October 13, an election by secret ballot was conducted on October 30 among the employees in the following unit:

> All full-time and regular part-time housekeeping, kitchen and maintenance employees employed by the Employer at its facility located at 425 Ovington Avenue, Brooklyn, New York, but excluding all professional employees, non-professional medical staff, medical staff, temporary employees, casual employees, office clerical employees, guards, managers and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

[1] All dates hereinafter are in 2009 unless otherwise indicated.

Approximate number of eligible voters	16
Number of void ballots	0
Number of ballots cast for the Petitioner	10
Number of votes cast against participating labor organization	5
Number of valid votes counted	15
Number of challenged ballots	1
Number of valid votes counted plus challenged ballots	16

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has been cast for the Petitioner.

The Employer filed timely objections to conduct affecting the results of the election. The Employer's objections are attached to this Report as Exhibit A.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director caused an investigation to be conducted concerning the above-mentioned Employer's objections, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The Regional Director also caused an independent investigation to be conducted. The investigation revealed the following:

Objection No. 1

In its first objection, the Employer alleges that the Petitioner improperly promised to waive initiation fees and dues for eligible voters as an inducement for them to sign a petition or authorization cards, and that these employees would not have to pay an initiation fee or dues if the Petitioner won the election. The Petitioner asserts that this allegation lacks merit.

In its offer of proof, the Employer provided a flyer distributed to employees by the Petitioner during the critical period with an affidavit from an employee who received the flyer during that time. The flyer, which is undated, is addressed to St. Nicholas Home employees and states, in part: "Employees joining our union through organizing drives are not required to pay any

dues at all, until they have the valuable wages, benefits and protections of their first contract." The flyer continues: "You will not have to pay any union initiation fee because you are newly establishing the union in your workplace." The Employer asserts that the above-quoted language created the impression among employees that the Petitioner would waive its initiation fees and dues for employees who joined the union before the election, but not for others. A copy of this flyer is attached to this Report as Exhibit B.

The Petitioner states that its policy is not to collect fees or dues from any newly-organized members until the Petitioner is able to obtain a signed collective bargaining agreement with an employer. The Petitioner asserts that this policy is consistent with applicable law holding that a waiver of union fees and dues is permissible where such waiver is unconditional and uniformly applied. See NLRB v. Whitney Museum of American Art, 636 F.2d 19 (2d Cir. 1980).

It is well established that a union's offer to waive initiation fees or dues is not objectionable as long as the offer is not limited to employees who join the union before the election, but remains open to employees who join after an election as well. See NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973); see also L.D. McFarland Co., 219 NLRB 575 (1975); Lau Industries, 210 NLRB 182 (1974). The flyer distributed by the Petitioner stated that employees were "not required to pay any dues at all, until they have the valuable wages, benefits and protections of their first contract." The flyer further advised employees: "You will not have to pay any union initiation fee because you are newly establishing the union in your workplace." The flyer does not condition this waiver of fees and dues on supporting the Petitioner prior to the election. In U-Haul Company of Nevada, 341 NLRB 195 (2004), the Board found that the union's distribution of campaign literature that clearly offered a waiver of initiation fees to all employees was lawful. The Board specifically stated that although there was a possibility that one or two employees, who were not agents of the union, mischaracterized the documents, such mischaracterization "does not change the lawful nature of the

Union's offer to waive fees." Id. at 195. The union's clear offer cured any ambiguity created by those employees. See also Detroit Receiving Hospital and University Health Center, 277 NLRB 1225 (1985) (union agent's ambiguous statements about a waiver of initiation fees was not objectionable when union clarified that the waiver was not conditioned on signing a card before the election.).

The Employer has presented no evidence that the Union's offer to waive fees and dues was contingent upon signing an authorization card or otherwise supporting the Union prior to the election. I therefore recommend overruling the Employer's first objection.

Objection No. 2

In its second objection, the Employer alleges that a supervisor employed by the Employer threatened employees to vote for the Petitioner. The Petitioner asserts that this objection lacks merit.

In its offer of proof, the Employer provided affidavits from three witnesses. The first affidavit was provided by an employee who works for the Employer and who identified Atef El Sharkawy as his/her supervisor. This affidavit does not provide any specific information about Sharkawy's supervisory status. According to this employee's affidavit, on or about October 20, in the kitchen of the Employer's facility, Sharkawy asked this witnesses if s/he intended to vote for the Petitioner. The employee replied that s/he did not plan to do so. According to the affidavit, Sharkawy told the witness that s/he should vote for the Union and that if the witness did not vote for the Union, "we could fire you."

The Employer also provided an affidavit from a resident at its facility. This affidavit also identifies Sharkawy as a supervisor, but again does not provide additional information about supervisory status. According to this affidavit, in early October, the resident was approaching the kitchen of the Employer's facility. As s/he approached the kitchen, this witness heard Sharkawy

"scream 'if you don't vote for the Union you will be fired.'" The resident also heard him "order" the individuals to whom he was speaking to vote for the Union. Finally, Sharkawy said that the staff should not trust the Employer's administrators Howard Russo and Anne Sorensen. The resident then entered the kitchen and saw Sharkawy standing in front of four named employees, as well as another unidentified individual.

The resident also testified that in late September, two named employees told the resident that Sharkawy told them that if they did not vote for the Petitioner, they would lose their jobs. One of these employees told the resident that Sharkawy had told him/her to "keep your mouth shut and join the Union."

The Employer also provided an affidavit from Howard Russo, an administrator. According to Russo, Sharkawy is responsible for supervising the Employer's housekeeping and food service workers. Russo also stated that during the campaign, unnamed residents and staff had advised him that Sharkawy was telling employees to vote for the Union or that they would be fired. Russo also provided copies of two warnings issued to Sharkawy. The first warning is dated February 27, 2009, and makes reference to Sharkawy's treatment of employees under his direct supervision. The second warning is dated September 24, 2009, and discusses Sharkawy's failure to schedule staff to provide adequate coverage on all shifts.

The Board announced its standard for determining whether prounion supervisory conduct is objectionable in Harborside Healthcare, 343 NLRB 906 (2004). Under Harborside, the Board employs a two prong test. First, the Board considers "whether the supervisor's prounion conduct reasonably tended to interfere with the employees' exercise of free choice in the election." Harborside, 343 NLRB at 909. This prong requires "(a) consideration of the nature and degree of supervisory authority possessed by those who engage in prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question." Id. The second prong weighs whether

"the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct." Id. In Harborside, a supervisor engaged in extensive prounion conduct, including threatening employees with job loss if the union won the election. The Board observed that the supervisor's "ability to both reward and retaliate against employees, together with her repeated and confrontational references to job loss, could reasonably lead . . . employees to believe that she was not merely expressing her personal opinion, but predicting a real prospect that they could lose their jobs." Id. at 910-11.

Under the Harborside standard, the alleged conduct of a supervisor questioning employees about their support for the Petitioner and threatening employees with job loss if they did not vote for the Petitioner, if true, could have affected the results of the election and would therefore warrant setting aside the election. I therefore direct that a hearing be held regarding the allegations contained in the Employer's second objection.

Specifically, at the hearing the Employer will have the opportunity to present direct evidence regarding Sharkawy's alleged conduct from those witnesses who provided affidavits as well as from those employees named in the resident's affidavit. In particular, the resident's affidavit offered by the Employer makes reference to reports s/he received from named employees in late September[2] alleging that Sharkawy had threatened them with job loss if they did not vote for the Petitioner. While this evidence is hearsay, such evidence in an offer of proof is sufficient, especially where the affidavit provides details such as the names of the employees involved and dates. In The Holladay Corporation, 266 NLRB 621 (1983), the employer provided an affidavit

[2] The petition was filed on September 28, thus the alleged conduct may have predated the petition. Such pre-petition conduct may be considered if it adds meaning and dimension to related post-petition conduct. See Dresser Industries, 242 NLRB 74 (1979).

containing hearsay evidence in an offer of proof. The Board found that such evidence warranted a full investigation of the employer's objections, especially since the affidavit named the employees who could provide direct evidence and included other details, such as dates.

Finally, the Employer will also have the opportunity at this hearing to amplify the evidence offered on Sharkawy's supervisory status under Section 2(11) of the Act, an issue on which the Employer will bear the burden of proof at the hearing.

Objection No. 3

In its third objection, the Employer alleges that agents of the Petitioner threatened employees prior to the election thereby causing employees to change their votes out of fear of retribution. The Petitioner asserts that this objection lacks merit.

The Employer has not produced any evidence showing that the Petitioner engaged in the conduct alleged in its third objection. It is incumbent on the party filing objections to provide evidence sufficient to prove a prima facie case within seven days of the date for filing objections. See Craftmatic Comfort Mfg. Corp., 299 NLRB 514 (1990). If the Regional Director does not receive timely evidence in support of objections, those objections should be overruled. See Star Video Entertainment L.P., 290 NLRB 1010 (1988). In order to support objections adequately, a party must do more than "rely on its bare allegations." Lange and Perkins LLC d/b/a The Daily Grind, 337 NLRB 655, 656 (2002). A party must at least identify its witnesses and provide a description of the evidence the named witnesses could provide. See id. In this case, the Employer has not provided any information in support of its third objection. Accordingly, I recommend overruling the Employer's third objection.

Objection No. 4

In its fourth objection, the Employer alleges that the Petitioner paid for employees' dinners and gave employees other things of value to induce employees to vote for the Petitioner. The Petitioner asserts that this objection lacks merit.

In its offer of proof, the Employer provided an affidavit from an employee. This employee testified that during the organizing campaign, s/he observed Union officials take unit employees to eat at a nearby diner, and that this employee believed that the Union officials paid for the employees' dinners at the diner.

The Employer has not presented sufficient evidence to support this objection. The only evidence presented in support of this allegation is that an employee "believed" that Union officials were buying dinners for unit employees at a diner. As explained above, the party filing objections must provide evidence sufficient to prove a prima facie case within seven days of the date for filing objections. See Craftmatic Comfort Mfg. Corp., 299 NLRB 514 (1990), supra. The Board has held that an objecting party must provide probative evidence in support of its objections; it is not sufficient to rely on mere allegation or suspicion. See Allen Tyler & Son, Inc., 234 NLRB 212, 212 (1978) ("In the absence of any probative evidence, [the Board] shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a 'suspicious set of circumstances'"); Audubon Cabinet Company, 119 NLRB 349, 350-51 (1957) ("Objections, to merit investigation by a Regional Director, must be reasonably specific in alleging facts which prima facie would warrant setting aside an election. [A] general conclusion devoid of any specific content or substance . . . fails to satisfy the Board's requirement of reasonable specificity in the filing of objections."). The Employer's evidence, based on an employee's "belief" that the Petitioner bought employees dinner, is insufficient to support an objection.

Moreover, even if the Employer could establish that the agents of the Petitioner bought dinner for employees, the Employer has presented no evidence to suggest that this conduct is objectionable. Generally, it is not objectionable for a party to provide meals or beverages to employees during a campaign. The Board has found that such conduct does not impact employees' ability to make a free choice when casting their ballots. See El Fenix Corp., 234 NLRB 1212 (1978) (union's promise of a banquet or dinner if the union won the election found not objectionable); see also Chicagoland Television News, Inc., 328 NLRB 367 (1999) (not objectionable when an employer gave a party on the day before the election and provided free food and beverages); Northern States Beef, 226 NLRB 365, 367 (1876) (a cocktail party and dinner given by the employer on the night before an election was found not objectionable); Lloyd A. Fry Roofing Co., 123 NLRB 86 (1959) (a party given by a union on the day before the election with free beer and soft drinks was found not objectionable).

Cases in which the Board has found that the offer of dinners to be objectionable involve particular facts which demonstrate that employee free choice may have been compromised. For example, in B & D Plastics, 302 NLRB 245 (1991), the employer gave all unit employees a paid day off to allow employees to attend a pre-election cookout to hear the employer's final anti-union message. The Board found that this case presented "special circumstances" which suggested that the employer's conduct could have undermined free choice. See also River Parish Maintenance, 325 NRLB 815 (1998) (employer sponsored a dinner two days before election at which attendance was mandatory and employees were paid to attend).

In this case, the Employer has offered no evidence to suggest that the Petitioner undermined employee's free choice in the election merely by providing free dinners to unit employees at a diner. The Employer does not allege any additional facts that would render the Petitioner's conduct objection. For these reasons, I recommend overruling the Employer's fourth objection.

Objection No. 5

In its fifth objection, the Employer alleges that the Petitioner distributed information to employees that was grossly inaccurate in order to mislead employees into voting for the Petitioner. The Petitioner asserts that this objection lacks merit.

In its offer of proof, the Employer provided a flyer allegedly distributed to employees by the Petitioner during the campaign. The flyer, which is dated October 26, refers to Michael Rosado, who the Employer had hired as a consultant. The flyer states that Rosado had been affiliated with a local union which was placed in trusteeship because of corruption and "mob ties." The flyer alleges that Rosado was removed from his local union for "deliberately obstructing the trusteeship and making personal expenditures in violation of federal law." The Employer alleges that these claims are all false and were made to mislead voters and to scare them into voting for the Petitioner. A copy of this flyer, which was printed on the Petitioner's letterhead and was signed by Kevin Lynch, the Petitioner's Director of Organizing and Legislative Affairs, is attached to this Report as Exhibit C.

The Board has long held that misrepresentations in campaign propaganda do not constitute grounds for setting aside an election. See Midland National Life Insurance Co, 263 NLRB 127 (1982); see also TEG/LVI Environmental Services, Inc., 326 NLRB 1469 (1998). In such cases, the Board will not consider the accuracy of campaign claims, but will allow employees to evaluate such claims for themselves. Midland National Life Insurance Co., 263 NLRB at 130, 133. The Board will intervene only in cases where voters could not recognize the material as propaganda, such as in the case of forgery. The Board has found specifically that statements alleging that a union maintains mafia connections, even if false, are permissible during a campaign. See Salvation Army Residence, 293 NLRB 944 (1989).

In this case, the flyer appears on the Petitioner's letterhead and is signed by the Director of Organizing and Legislative Affairs for the Petitioner. This flyer is easily identified as coming from the Petitioner and clearly constitutes campaign propaganda and as such employees could evaluate the Petitioner's claims for themselves. See Midland National Life Insurance Co., supra. I therefore recommend overruling the Employer's fifth objection.

Objection No. 6

In its sixth objection, the Employer alleges that the Petitioner engaged in "other improper conduct affecting the results of the election." The Petitioner asserts that this objection lacks merit.

The Employer did not produce any evidence in support of this objection that had not been submitted and considered in regard to the other objections. Accordingly, I overrule the Employer's sixth objection.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held regarding the Employer's second objection. I have recommended overruling the Employer's remaining objections.

Accordingly, pursuant to the authority vested in the undersigned by the National Labor Relations Board, herein called the Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by Objection No. 2.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file with the Board, an original and seven copies of Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a

copy thereof, together with a copy of any brief filed, upon the other parties. A statement of service shall be made to the Board simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that on Monday, December 7, 2009, at 9:30 a.m., and on consecutive days thereafter until concluded, at Two MetroTech Center, 5th Floor, Brooklyn, New York, a hearing will be conducted before a hearing officer of the National Labor Relations Board on the issues set forth in the above Report, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

RIGHT TO FILE EXCEPTIONS

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on December 8, 2009, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative,**

parties are encouraged to file exceptions electronically. If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[3] A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the

[3] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Brooklyn, New York, on this 24th day of November, 2009.

John J. Walsh
Acting Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center
Brooklyn, New York 11201